

# The Content and Context of Hate Speech

RETHINKING REGULATION AND RESPONSES

Edited by

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## Interview with Robert Post

**Peter Melnar:** When I first came to the United States, a friend told me that the supposedly strong protection of freedom of speech in this country is simply a myth. Would you agree?

**Robert Post:** I suppose it would depend upon what one means by "myth." In certain communicative contexts – like the Internet, newspapers, magazines, or movies – constitutional protections for speech are quite robust. But in many other settings there is far less, if any, constitutional protection. So can we conclude that the reputation of a strong First Amendment is merely a myth?

**PM:** More narrowly, then. It is often stated that in the United States "hate speech" is constitutionally immune from regulation. Is this correct?

**RP:** In many settings speech that is demeaning or degrading to particular minorities or genders or sexual orientations is regulated in the U.S. with few, if any, constitutional impediments. In private settings, for example, where there is no state action, constitutional restrictions do not apply. In such private settings hate speech can be regulated without constitutional constraint.<sup>1</sup> There are also many public settings in which hate speech can be and is suppressed regularly and effectively. These tend to be settings in which the regulation of hate speech does not compromise public discourse.

**PM:** For example?

**RP:** In courthouses, for example. Attorneys and judges will be penalized for hateful expression. So will teachers and students in public elementary and high schools.

<sup>1</sup> Peter Melnar explains why, in places, "hate speech" regulation works in "Responding to Hate Speech with Art, Education, and the Immoral Danger Test," *Chicago Tribune*, 2012.

This interview was conducted in New York City on October 24, 2013. Peter Post subsequently revised and expanded his remarks. I do.



have elsewhere called managerial domains. A managerial domain is an institution created to accomplish a specific function, to achieve a particular goal. The goal of a continuum is to produce justice. The function of a university is to disperse education and to produce knowledge. Once a bounded institution exists that is oriented toward a specific mission, the institution will regulate persons within its domain in ways necessary successfully to achieve its function. And this implies that the institution will also regulate the speech of persons within its domain as is necessary to be instrumentally effective.<sup>17</sup> The constitutional rationale of public discourse is precisely the opposite of that of a managerial domain. The objective of the latter is to achieve its purpose; the objective of public discourse is to determine what our purposes are. Within public discourse, goals must perennially be taken as provisional and revisable.

PM: Cited of "hate speech" in these "managerial settings" does not exhaust the instances of actual regulation in the United States. For example, Jacobson and Schlink point to two others: regulation of employers, making them liable for harassing speech by their employees, and the self-regulation of the broadcast and cable industries.<sup>18</sup> How do these latter contexts fit within your conceptual schema?

RP: With regard to workplace regulation, what is such as Cynthia Estlund contended that workplace speech should be considered part of public discourse, that is to say it should be considered part of public-opinion formation.<sup>19</sup> The proposition is serious and debatable, but it is clear that it does not represent the current normative perspective of the contemporary American legal system. Title VII<sup>20</sup> places significant restrictions on workplace speech which creates a hostile environment,<sup>21</sup> and courts do not evidence any serious inclination to use the First Amendment to restrict these aspects of Title VII.<sup>22</sup>

The situation with regard to broadcasters is very different. Self-regulation by broadcasters is a response to the threat of regulation by the Federal Communications

<sup>17</sup> For the general theory of this point see Robert Post, "Between Governance and Management: The Dilemma and the Promise of Public Opinion," 24 *UCLA L. Rev.* 1717 (1977). For an elaboration of this point in the specific context of universities, speech codes, see Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 42 *Wm. & Mary L. Rev.* 267 (1995).

<sup>18</sup> Jacobson and Schlink, *supra* note 6.

<sup>19</sup> See, e.g., Cynthia Estlund, "Lemonizing Work and Citizenship: A Democratic Solution to a First Amendment Problem," 29 *Am. U.L. Rev.* 1071 (1999) (arguing that the Supreme Court has underplayed the fact that employees face speech codes and unions during the public sector to be doing what they have to do as a "Constitutional Lifeline"). The Workplace in a Hostile Environment: Professors' Thoughts on the Role of Labor and Employment Law, 112 *Pa. L. Rev.* 1297 (2004) (describing the workplace as a uniquely hostile setting for speech and as an important site for the forum for public discourse). Title VII of the Civil Rights Act of 1964 codified at 42 U.S.C. § 2000e.

<sup>20</sup> See Jacobson and Schlink, *supra* note 6.

<sup>21</sup> Arguments that Title VII does violate the First Amendment have been made, generally by scholars with very different political commitments. See, e.g., Kenneth B. Karst, "Is the Labor Law for the First Amendment? Title VII's Regulation of Employee Speech," 27 *UCLA L. Rev.* 361 (1980). For a contrary conclusion, see, e.g., Estlund, *supra* note 19.

Commission (FCC). American constitutional law currently accepts a number of distinct rationales for regulating the content of broadcasting, most especially for prohibiting the broadcast of indecent speech during certain hours of the day when children are likely to be in the audience. One traditional justification concerned spectrum scarcity;<sup>23</sup> in these days of the Internet and of a virtually infinite number of cable channels, that rationale has become less and less convincing. The justification that presently retains pride of place is the one offered in the *Pacific* case;<sup>24</sup> in which the Court reasoned, roughly, that because broadcasting is a powerful method of socializing the young, it is necessary to regulate broadcasting to ensure that its intrusion into the home does not disrupt the transmission of essential community values from parents to children. Any such disruption would undermine the very decency and civility that public discourse, in a democratic republic, requires to fulfill its function of democratic legislation.<sup>25</sup>

PM: So you read *Pacific* to permit limits not only on indecency but also on some sorts of "hate speech"? It is, it is a special limitation on broadcast "hate speech," an exception from what you call "the paradox of public discourse," that there seems to be no way for the state under the prevailing interpretation of the First Amendment to uphold civility rules in public discourse, although a minimum of civility rules might seem to be necessary for public discourse to function properly?

RP: This is currently a matter of constitutional speculation, but my guess is that if the FCC imposed on broadcast television the kind of regulation that Jerome Waldron is talking about – limitations designed to provide members of vulnerable groups the "assurance" necessary to go about their lives in a secure and dignified manner<sup>26</sup> – and these limitations were defined in a suitably precise and limited way, these regulations would be upheld by the courts. But that's merely a prediction. Such a conclusion would be consistent with the rationale of *Pacific*. Of course, a court that disagreed with *Pacific* might reach a different conclusion about the extent to which a minimum of community norms might be necessary to sustain the function of public discourse.

The Internet, in contrast to broadcasting, is understood to be a medium of communication in which adults can control the participation of children by filters and other devices, so that adult communication on the Internet cannot be regulated to make it appropriate for the socialization of children.<sup>27</sup> The Internet is therefore for constitutional purposes analogous to media such as newspapers and movies. *Pacific*'s justification for content regulation, which sounds in the socialization of children, drops out of the picture.

<sup>23</sup> See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–76 (1969).

<sup>24</sup> 430 U.S. 1, 16 (1977) (quoting 42 U.S.C. § 2000e-2).

<sup>25</sup> Robert Post, "Comments and the First Amendment," 20 *Am. U.L. Rev.* 2 (1997).

<sup>26</sup> See Jerome Waldron, "Hate Speech and Public Civility: A Characterization."

<sup>27</sup> *Reno v. American Civil Liberties Union*, 525 U.S. 129 (1997).

PM: In your previous work, notably your book *Constitutional Domains*,<sup>15</sup> you have distinguished the model of democratic self-government, in which "autonomous wills" are coordinated and reconciled, from the form of social organization that you label "community." Public discourse must operate very differently, and be subject to very different regulation, in these two settings. Could you explain the tension between democracy and community and how they can be reconciled?

RP: The scope and nature of public discourse depends upon the scope and nature of what is "public." In my work, I contrast the social formation of the "public" with the social formation of what I call "community."

I define "community" as a social structure that inculcates common norms into the identities of its members.<sup>16</sup> Only fetal children grow up outside communities. Normal human beings, as George Herbert Mead explained, are raised in a community that socializes them into its norms. All normal human beings "internalize" these norms, so that they become part of the structure of their personality.<sup>17</sup> Normal human beings know how to treat other human beings within their culture, how to distinguish friends from enemies, how to evince respect and contempt, and so on. The same norms that are powerfully built into the structure of individual personalities are also powerfully built into the collective identity of the community, so that there is a continuous symmetry between collective and individual identity. I use the term "community" to refer to this deep and inevitable form of social solidarity, in which ongoing processes of socialization ensure that social norms reciprocally define individual and collective identity. Building on Mead's work, I think of community as a primal and indispensable form of social organization. It creates identities; it creates values; it creates structures of attitude and motivations; it creates social solidarity and unity that allows for group identification, and so on.

The social formation of the "public" is not at all like this. The public is a space that encompasses many communities. This idea was developed in America through sociologists, particularly at the University of Chicago in the early years of the twentieth century, who were studying major urban metropolitan areas in which there were entire distinct communities.<sup>18</sup> Take the complex and diverse city of Chicago. It encompassed neighborhoods in which persons congregated from distinct communities, from Italy, Poland, Slovakia, neighborhoods in which there lived primarily Jews, or African Americans, or White Anglo-Saxon Protestants (WASPs), and so on. Each of these distinct communities possessed a unique identity, a particular form of social solidarity based on particular customs, traditions, histories, and norms. Yet these various neighborhoods somehow had to come together to govern the common

metropolitan area of Chicago, which was a vast space that embraced many diverse communities. The common space of what I call the "public" is that into which persons enter as they leave their insular neighborhoods and communities and seek to work together with those who have been socialized into distinct norms. Because we are a multicultural nation, we have been forced in the United States to forge a healthy public space in which persons from diverse neighborhoods can meet each other, on terms of equality and mutual respect, outside of their respective communities. Of course, the public space would be neither safe nor equal if persons entering it would automatically be subject to the norms of an alien community.

As the need for a safe and neutral public space became increasingly apparent in the third decade of the twentieth century, which is to say as WASP dominance of the public sphere that had heretofore been accepted as natural began to weaken, we developed in the United States a First Amendment doctrine designed to ensure that the state would remain neutral with respect to the enforcement of community norms within public discourse, which is to say within those forms of speech necessary for the common project of democratic self-government.<sup>19</sup> The First Amendment sought to ensure that public discourse was safe and welcoming to all individuals, it refrained from suppressing speech that might be inconsistent with the norms of any particular community. The First Amendment ensured not merely a marketplace of ideas, but also a marketplace of communities.

The key case in this development was *Cantwell v. Connecticut*,<sup>20</sup> which interpreted the First Amendment to hold that in public discourse we meet each other as equal persons who are immune from the condemnation that might be imposed by the norms of an alien community. Even if communicating according to the norms of a speaker's own community profoundly insults and denigrates another, because the community norms of an addressee regard such communication as offensive and degrading, the First Amendment will nevertheless typically prohibit the law from enforcing the community norms of an addressee.

Our unique veneration of church and state is a good example of the way in which we have interpreted our Constitution to ensure a public space that remains permanently outside the domain of any single community. The Establishment Clause does not prohibit the establishment of religion because we are an unreligious nation. To the contrary, we are the most religious of all modern developed nations. We instead prohibited the establishment of religion because religion was so important to Americans in the eighteenth century and because they understood that they were so religiously diverse. Justice was afraid that it would come under the control of another, alien sect. Thus they then agreed that no sect would be able to seize control of the common resources of the federal government. The Establishment Clause guaranteed that the federal government would remain neutral ground, and hence

<sup>15</sup> Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press 1992).

<sup>16</sup> *Id.* at 302.

<sup>17</sup> Robert Post, "Between Democracy and Community: The Legal Constitution of Social Form," in Susan S. Waddock, *Democracy, Community and John W. Deere* (Chicago: Univ. of Chicago Press 1994).

<sup>18</sup> See Post, *supra* note 15.

<sup>19</sup> 37 U.S. 266 (1960) (setting out basic First Amendment principles); *Johnson v. California*, 480 U.S. 481 (1987) (on the other fl.

that religious practices could safely remain voluntary and privatized with respect to federal control.

Norms of civility, by which we distinguish speech that is hateful from all other forms of speech, are like the tenets of a religion. Different communities have different norms of civility, and hence they classify different forms of speech as hateful. In the 1940s, when the notion of public discourse was being constructed by our Supreme Court, multiple communities were seen as vying for control of the public space. The upstanding decent people on the right side of the tracks wanted to prohibit one form of one discourse, whereas the working classes wanted to ban a different kind of discourse, and the churches wanted to suppress yet a third form of discourse. Which form of civility would the law impose to control public discourse? The Court's answer was that no form of civility could be imposed.

Precisely because in the United States community was fragmented, precisely because there was deep, sincere, and divisive disagreement about the forms of speech that should be prohibited as hateful, the Court adopted a rule that was analogous to the Establishment Clause. It held that no community could seize the power of the state to impose its own norms on public discourse.<sup>23</sup> That is the true meaning of such reiterated but fundamentally odd Supreme Court maxims as "one man's vulgarity is another's lyric,"<sup>24</sup> or "one man's amusement teaches another's doctrine."<sup>25</sup> The Court is not really advocating a kind of hopelessly relativism. In many contexts the law distinguishes vulgarities from lyrics, amusements from doctrines. These distinctions, however, turn on community norms, and what such norms really mean is the First Amendment will not permit such norms to be enforced within public discourse.

Underlying this marketplace of communities is one, additional and important qualification. Karl Polanyi once argued that any marketplace must be "embedded" in a larger community.<sup>26</sup> That principle also applies to the marketplace of communities. If one is going to tolerate different forms of speech, that tolerance itself must reflect an image of the public good, it must reflect a particular normative image of the good state that is democratically responsive to the public opinion of its citizens. Absent such an image, public discourse cannot perform its allotted function of underwriting democratic legitimacy. So without an image of a state like, say, Hungary, an image of a social order that is larger and more encompassing than any single particular community within Hungary, there is no reason for particular Hungarians to leave their own particular communities to participate with strangers to make a public opinion that will direct the larger Hungarian state. There is no reason to tolerate alien communities at all. One can see here that the whole idea of democratic self-government, is itself a community norm that must be sustained through typical forms of community socialization, including specifically democratic

education. And this, in turn, means that if the toleration of incivility fundamentally threatens the community norms that sustain democracy itself, then the logic I have been explicating no longer applies.

In the United States, therefore, courts always face a dilemma. With respect to any particular government regulation enforcing a civility rule within public discourse, it can be argued either that enforcement of the civility rule is necessary to sustain the community life of the nation, so that striking down the regulation would ultimately undermine democratic self-government, or that, to the contrary, the enforcement of the civility rule violates the tolerance required in democratic self-determination, so that allowing the regulation needlessly displaces and therefore damages democratic self-government. One sees this dilemma endlessly reiterated within American jurisprudence.

PM: Do you think this model can work only in the United States?

RP: Habermas argues that it can work in Europe. Habermas's idea of "constitutional patriotism" is quite relevant to what I have been saying.<sup>27</sup> Habermas believes that one can have loyalty to an entity that is defined by inclusiveness and difference. He initially based his notion of constitutional patriotism on the United States, which at one point he considered an appropriate model for Europe.

PM: Your model seems to have both a normative and a descriptive/cultural element. The normative element requires that the state respect the authorship of everyone in the public discourse, the cultural/descriptive element holds that everyone accepts that others might have different views about civility rules in the public discourse but that in the background there is something common that binds people together in some shared enterprise.

RP: That's right; there is some *unit* that defines public discourse. If we protect public discourse so that we might engage in "self-government," we must first ask who the "self" is that seeks to govern. If we answer "the people," then we must join with Rousseau, who properly observes that we must first "examine into that by which a people became a people; for, on this . . . rests the true foundation of society."<sup>28</sup> However we define "the people" who have thrown themselves together into the common enterprise of self-government through the perpetual formation of public opinion, the success of democratic self-government requires that the unit we define must

<sup>23</sup> *Cohen v. California*, 401 U.S. 369, 382.

<sup>24</sup> *Waller v. New York*, 333 U.S. 624, 628, 629.

<sup>25</sup> See generally Karl Polanyi, *The Great Transformation* (London: Routledge 1944).

<sup>26</sup> See Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* 222-6, 219-26 (Cambridge and Berlin: DeGruyter, 1998). Cassin C. Newman, "The 'All' Press 1995," Frank Michelman describes "constitutional patriotism" as meaning "a moral attitude . . . of attachment to one's country, specifically in view of a common spirit sustained by the common people and their leaders in debating and deciding disagreements of essential constitutional import." Frank Michelman, "Virtuous, Invidious, and Constitutional Patriotism," 65 *Dan. L.J.* 863, 1004, 1022 (1991).

<sup>27</sup> See Jacques Maréchal, *A Treatise on the Social Contract: On the Principles of Political Law* 18 (J. Maréchal trans.).

necessarily share a common commitment to, at a minimum, the community norms of self-determination as the proper form of social solidarity.<sup>21</sup> The implication is that democracy is always founded on some larger notion of an encompassing community that creates the public and that requires common collective authorship.<sup>22</sup> Without this normative premise, I think it will be very hard to construct a coherent concept of freedom of speech. Sometimes the preconditions for loyalty and tolerance must be constructed on the basis of antecedent forms of social solidarity, on some form of community.

PM: Do you mean that this normative premise provides a precondition for Hungary as Central European and Eastern European combine, generally, if they want to construct a coherent concept of freedom of speech, and that it combines in which the cultural elements that you described are missing are, not, or cannot be, legitimate democracies?

RP: I don't know. I don't know enough about what it is like to live in a democracy like Russia or Hungary. Do citizens there experience authorship? Or do they feel oppressed no matter what party is in power? In my country, George W. Bush was in power for eight years and he did many things I abhorred. Nevertheless, I did not and could not refuse to accept an identification with my government. My loyalty transcends the particular actions of a particular party, however much I disagree with the actions it may be taking. My relationship to my government is based upon a larger time horizon than the Bush presidency. Does that larger time horizon exist in Russia or Hungary? If it does, then you have the resources to construct a real democracy.

PM: How might a country go about developing the two cultural elements of loyalty and tolerance if they are images of underdeveloped?

RP: I think that an important resource is collective memory. There has to be a continuous story of national development and ideals. In this country, our tradition of freedom of speech is itself an essential collective memory that inspires loyalty and tolerance. And I suspect the same would be true for many European countries. If they don't have such a story, if they don't have the resources for collective memory – and this is István Rév's point about Hungary<sup>23</sup> – it will be very difficult to create the normative resources for public discourse and the workplace of communities. Without some larger community value, nothing will constrain the exercise of raw power, which frequently does not experience the need to be either tolerant or loyal.

Another way of saying this is that in the United States we believe that even the positive enactments of the state are ultimately accountable to the most deeply held norms of the community that underwrites the state. This is the area of our

doctrine we call substantive due process, which constrains state action on the basis of foundational traditions and values.

PM: At the gay pride parade in Budapest in 2009 (a topic to which I will return), the government protected the marchers very professionally. That shows both an ability and a certain political commitment to do so, indicating that the cultural element of tolerance is developing in Hungary.

RP: The example would be powerful if the government were acting to demonstrate toleration for speech with which it radically disagreed. Holmes put this most dramatically when he said that the true test of guarantees of freedom of speech turns on "freedom for the thought that we hate."<sup>24</sup> But note that such tolerance cannot be only for progressive causes. There must be tolerance for speech hated by the left as well as speech hated by the right.

PM: Yes, obviously.

RP: Not obviously.

PM: For many people not obviously.

RP: There are many who would construct asymmetries between the toleration of the left and the right. In fact we heard this position articulated in our symposium.<sup>25</sup>

PM: I wonder how complete this model of unregulated discourse between competing communities is. Suppose community A has civility rules under which members are not only free to engage in anti-gay speech, for example, but even required to do so, whereas community B, in this example, a gay community, has a norm of respecting the freedom of speech even of community A, which is engaging in "hate speech" aimed directly at community B. Then it is not really a fair fight. Can the state intervene in such circumstances?

RP: Once again, it is important to avoid a picture in which the state either acts in an aggressive and intolerant way or is paralyzed and cannot act at all. In the United States, as I mentioned, the regulation of speech is quite fragmented and discontinuous. The government can intervene in some contexts, but not in others. In the workplace, rules against anti-gay speech are permissible. So communities are not in this sense equal in the workplace, we permit the suppression of some forms of uncivil speech. But public discourse is a limited and specialized form of communication in which communities must politically be regarded as equal. The reason why we impose such odd rules on public discourse is that it is the precise location in which the "self" in "self-government" is created. It is the location in

<sup>21</sup> See Robert Post, "Democracy, Popular Sovereignty, and Judicial Review," *Not of One Piece* 2009.

<sup>22</sup> István Rév, *Rebirth of Justice: The History of Post-Communist Slovakia* (Princeton: Princeton UP, 2007).

<sup>23</sup> United States v. Schmeidler, 294 U.S. 464, 467 (1935); Holmes v. [unintelligible].

<sup>24</sup> Post is working here to reiterate the point made in his speech, suggested by Justice Williams, that took place at NAC Lias Schmeidler October 27–28, 2009. I'd like to thank him for this.

which we collectively decide what is and what is not fundamental. And if that question is already decided and imposed upon public discourse, then we lose the capacity collectively to think through the problem. That is why the state cannot intervene to tip the scales within public discourse.

Notice also, however, that even though we prevent the state from regulating public discourse in the name of a community norm, we nevertheless freely allow the state to participate within public discourse as a speaker. The state is a frequent, powerful, and loud participant in public discourse. We respect a president who stands up and asserts we should treat each other with civility and respect and that we should seize the time of public conversation.<sup>32</sup>

PM: I have heard you elsewhere mention the example of the US government expressing support for civil rights by issuing a commemorative stamp in honor of Martin Luther King. That's also forcible speech.

RP: Precisely so.

PM: But in the public discourse, under the prevailing First Amendment model, special protection of certain groups is not possible.

RP: For speech purposes. The state can adopt affirmative action programs; it can regulate conduct in many ways. But as a general matter the First Amendment prevents the state from restricting what people do and do not say in public discourse, although this generalization has exceptions. There are limits: that the Court has found it necessary to impose. The way I conceptualize those limits is that the social form of community is logically and ontologically prior to that of democracy. So if incivility, occurring in public discourse, threatens to undermine the very idea of a democratic community, if they threaten to undermine the norms of civility that allow public discourse to serve its function, the Court will permit regulation. But what is permissible will be a very thin form of regulation at the margins, and we will characterize unprotected speech with labels like fighting words,<sup>33</sup> or "true threats,"<sup>34</sup> or incitement to imminent violence.<sup>35</sup> These are marginal cases, but they do definitely exist, and they teach us an important lesson. They stand for the proposition that the Court will allow the maximum possible degree of freedom that is

compatible with the survival of the democratic community.<sup>36</sup> So not even in public discourse is there anything like "absolute protection." Not even close.

PM: The examples you give all turn on the context of the speech.

RP: Most fundamentally, they turn on the legal characterization of the speech act at issue. Courts typically ask whether a particular speech act constitutes an effort to participate in public opinion formation, or whether it instead is really a threat, or a fight, or an incitement to immediate illegal action. These characterizations are intuitive and pre-theoretical, and as you say, they are very influenced by context. Many of the most basic First Amendment judgments turn on such pre-theoretical acts of classification.

Here's an example. As I have mentioned, there is an essential difference between state regulation of speech within a managerial domain and within public discourse. But if a soldier in a military barracks is writing his Senator complaining about his commanding officer, should the speech act be classified as within the managerial domain of the military, in which case it can be punished because inconsistent with the discipline required for the effective functioning of the military, or should it be classified as the public discourse of a citizen petitioning his government? This is a normative question, and it is the kind of pre-theoretical determination that is constantly made and continuously underlies First Amendment doctrine. If speech is within the managerial domain of the military, it can be regulated as hate speech. Hate speech between soldiers can be and is suppressed insofar as it is inconsistent with the mission of the military. When such speech is within public discourse, by contrast it is relatively immune from state regulation. Often hard cases within public discourse are handled by courts classifying speech as outside public discourse.

PM: Do you mean to imply that democracies must allow people to engage in "hate speech" so long as "hate speech" is expressed within the public discourse, otherwise they undermine their legitimacy regardless their cultural context?

RP: I was surprised at a recent conference<sup>37</sup> to hear several speakers say that each country should regulate hate speech in its own way. This is not the usual way in which I have heard this question discussed, which tends to be in a universalist register. It is argued that hate speech either does or does not come within a universal right to freedom of speech, and hence it is either suppressible in every state or in no state. This cosmopolitan approach is consonant with a highly internationalist doctrine of human rights that extend universally around the globe. The thought that hate speech may be constitutionally protected in one country but not in another seems inconsistent with a global vision of rights.

<sup>32</sup> For a thoughtful discussion of moral considerations of what most would characterize as hate speech, see the statements approved in the houses of the US Congress in 1992 condemning a November 1992 speech by Khalid Muhammad of the Nation of Islam at Bates College in New Jersey. H.R. Res. 443 (1992 Cong. 2d Sess. 1992) condemning the speech as "extremely disturbing" of its "moral values and self-kind" 42 Cong. Rec. 31671. I discuss it in 1994, adopting its "code of silence" in judgment expressing the sense of the Senate that the speech "violated the Senate's tradition, reputation, and respect for all Americans and is therefore condemned."

<sup>33</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>34</sup> See *Virginia v. Black*, 533 U.S. 31, 121 S.Ct. 2131, 140 L.Ed.2d 161 (2001) (quoting *Brandenburg v. Ohio*, 395 U.S. 561 (1969)).

<sup>35</sup> See *Brandenburg*, 395 U.S. 561, 1069.

<sup>36</sup> On the concept of democratic community, see Post, chapter 6, 7.

<sup>37</sup> Post is referring to a conference based on the contributions in this book which took place at the Cambridge School of Law on May 17, 1993. I do.





says that to the extent that a state firmly commits to a particular identity, so much so that it prohibits persons from thinking or communicating about any other identity, then it *pro tanto* ceases to be a democratic state because it refuses to be responsive to what its citizens are actually thinking and so withdraws from the project of self-government. Julie has contrasted the French state's refusal to be neutral with the impotence of the American state, which she regards as effectively paralyzed by a misconceived commitment to neutrality that is mandated by the First Amendment. For the reasons I've already discussed, I think this contrast is overdrawn. The First Amendment prohibits content discrimination in the civil and criminal regulation of public discourse. But as a general matter, the American state is far from neutral. The American state takes substantive positions all the time. It affirms civil rights, equality, tolerance, and so forth. Consider our regulation of workplace actions and speech. Consider our stamps and monuments. Consider the ongoing expression of American government officials about issues of race and toleration. Consider the rules and regulations that the American state imposes on the army, on government institutions, on contractors, and so on. No one should confuse the American state with a neutral state. What is true is that the American state will not regulate public discourse through civil or criminal sanctions in ways that are based on content. So the contrast between us and the French is actually much smaller than I think Julie implies.

PM: So to ensure legitimacy and self-government, the government cannot intervene in the public discourse – through civil or criminal sanctions in ways that are based on content – other than in exceptional situations.

RP: It can and does intervene in public discourse in the sense that the government itself speaks in public discourse. But you are correct that a concern with democratic legitimacy prevents it from using civil and criminal sanctions to regulate public discourse except in very unusual situations.

PM: All right. And what about the claim that another way for the state to achieve legitimacy is by excluding certain messages from the public discourse?

RP: Jeremy Waldron makes an analogous point. For him, democratic legitimacy does not require including in public discourse attacks on accepted "fundamentals" as to which there is no longer a meaningful, ongoing debate. Jeremy's position presupposes that we agree about the fundamentals, that they are not controversial. In his model, something like in the old picture of Patrick Deslin,<sup>45</sup> the legitimacy of the state depends upon enforcing what we already all agree upon.<sup>46</sup> Such a position would have much to recommend it if in fact there was universal agreement about what was "fundamental." But, as in Deslin's case, those who advocate for

the enforcement of fundamentals are most apparently attempting to discredit and exclude those who precisely disagree with their view of fundamental values. In the context of hate speech, we are by hypothesis addressing a situation in which many persons deny "fundamental" principles, and wish to speak in ways that are inconsistent with them. This suggests to me that in fact we do not all agree on such fundamentals at all. Waldron of course concludes that there is not unanimity on these principles, stating only that "these matters are more or less settled."<sup>47</sup> But this is a significant concession, and it seems to imply that ultimately his claim is that such principles *should* be fundamental and beyond dispute. That amounts to the proposition that persons should be prevented from communicating because in our view they have nothing of value to say.

PM: Let me turn to a specific example involving "hate speech." In Budapest in 2008, extreme right-wing Internet sites encouraged "counter-demonstrators" to block the gay pride parade, by force if necessary. At the parade itself, "counter-demonstrators" were throwing rocks, acid-filled eggs, and bottles when they could get close enough, and many of them were shouting homophobic and anti-Semitic epithets. Let's assume that at the parade some people did not call for stopping the parade, by force if necessary, or for physically limiting participants of the parade, but they did express their homophobic and racist ideas. Would, or should, such speech be protected under *Brandenburg*?<sup>48</sup>

RP: It would be helpful closely to parse the case that you put. First, there are marchers, who wish to express their point of view, which concerns pride in gay culture. Presumably their message is that gay culture should be accepted in Hungary. [The parade is in this sense the public expression of an idea.] A central principle of freedom of speech is that the state cannot suppress expression of an idea in public discourse merely because it disagrees with that idea. This principle follows from the thought that public discourse is the medium within which democratic will is formed, so that if the state were to control which ideas could be expressed in that medium, it would no longer be responsive to a democratic will. The right to express this controversial idea in the parade should therefore be protected.

Second, a parade is not simply words. It is not abstract text. It is a material manifestation that can cause physical effects, like trash, traffic jams, noise, and so on. Most communicative acts have physical dimensions of this kind. Loudspeakers cause sound, movie films cause congestion and fire hazards, newspapers cause litter, DVDs consume chemicals, and so on. Thus the necessary physical dimensions of communication can be regulated without compromising freedom of speech. It is a continuous and complex problem. In the context of parades, this problem includes

<sup>45</sup> *Id.*

<sup>46</sup> *Brandenburg v. Ohio*, 395 U.S. 444–451 (1969) (holding that speech advocating violence or lawlessness is constitutionally protected, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

<sup>47</sup> Patrick Deslin, *The Importance of Morals* (Oxford: University Press, 1997).

<sup>48</sup> See Waldron, *supra* note 46.

bona parades can be reconciled with traffic control, pedestrian safety, commercial and other usages of street space, and so on. On the constitutional side of the question is the importance of persons being able to display the medium of parades in ways intuitively regarded as integral to the formation of public opinion.

I find, the message I convey in my parade or speech may provoke others to violent acts. The question posed here is whether the costs caused by speech – the negative reactions and effects – should be internalized by the speakers. Because participation in public discourse is so precious, we typically do not permit hecklers' vetoes.<sup>4</sup> The state protects the right to speak, even if private citizens who detest the speech seek to suppress it. Nevertheless, this presumption, like all default positions, has limits. At some point the state is justified in suppressing speakers if their speech will cause extreme and unavoidable harm to themselves or to others. Where this point is reached is a judgment call. If the state is too quick to suppress the speaker, we may be suspicious that the supposedly paternalistic intervention is merely an excuse for siding with those who oppose the speaker. And yet the state is also deterred if it ignores the safety of the speaker altogether.

In the situation you propose, the counterdemonstrators have as much right as the initial paraders to voice sentiments, even unpopular sentiments that disavow the marchers. They have every right to oppose gay rights. They have every right to show up and shout homophobic slogans. Just like gay persons have every right to burst forth from the closet and demand acceptance, so those who oppose gay rights have every right forcefully to assert that they do accept gays. There is a real public controversy between these two groups.

It follows that the state cannot suppress the anti-parade demonstrations on the ground that the state disagrees with their message, just as the state cannot stop the parade on the ground that the state disagrees with its message. The state must be neutral as between these messages. An antipathic to hate speech would not seem particularly helpful to me in guiding the state in how to proceed. What the state does need to do is to ensure that both sides of this demonstration can peacefully express their opinion. In doing so the state has the obligation of preserving the peace and of constraining those who would violate the place. How in the end this must be done is a highly contestable question of judgment. But antipathic would seem to me to have little to do with it.

PM: Even if the "counter-demonstrators" would deny equal citizenship?

RP: The question of what does and does not constitute equal citizenship is itself a question of political opinion. Those who argue against naturalizing undocumented immigrants are taking a position about equal citizenship, yet it is also a position

in an ongoing political controversy. The question of which sexual practices should be regulated and which should be constitutionally immune from regulation is similarly a question about the political constitution of the state. For this reason, the counterdemonstrations should be entitled to express their message of disapproval.

It would assume, as might perhaps be inferred from your statement of the case, that the goal of the counterdemonstrators was not to express a message but to intimidate and harm participants in the gay parade, then we no longer have a symmetrical question of two parties each wishing to influence the formation of public opinion by conveying a message. Instead we have a question of one party wishing to communicate and a second party wishing through violence to prevent this communication. Nothing in the theory of freedom of speech would prevent the suppression of the latter. We would conceptualize the counterdemonstrators as attempting to commit a crime. The state is justified in preventing that crime. That the crime is expressive would no more implicate freedom of speech than would the attempt of the perpetrators of 9/11 to communicate a message minimize their crime under the First Amendment.

In short, it is one thing to have a counterdemonstration that seeks to convey a message, however hateful, and it is quite a different thing to use force and violence to prevent someone from speaking. There is no question at all that the state may and should prohibit the second.

PM: Sure, but what about "counter-demonstrators" who are engaged only in speech, but are expressing their views in a setting, in a context, when doing so directly and potentially decisively contributes to creation of the imminent danger of violence? Some people might not engage in violence even if they were encouraged to do so, either by Web sites urging that the parade should not be allowed to happen by any means necessary or by officers on the spot, who might or might not be engaged in express incitement to violence.

RP: One question you may be now asking is when advocacy of illegal action can be regulated as illegal action. This is not a question that is unique to hate speech. It occurs in innumerable contexts. In the United States, we have for several generations obscured this question under the so-called *Brandenburg* test that you mentioned earlier, which holds that the state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>5</sup>

The reason we require such a strict connection between advocacy of illegal action and illegal action is that we have learned through bitter experience that it is quite easy for a state to postulate some causal connection between speech and subsequent illegal conduct, however attenuated, and to use this connection as a pretext for suppressing speech which it wishes to silence because it disagrees with its content. During World War I, the United States Supreme Court, per Justice Holmes, allowed

<sup>4</sup> That is, we do not encourage a hostile audience to silence speakers through the use of hostility and the harm or violence of this tactic to produce. See Hans-Kristian Jørgen, *The Nazis and the First Amendment* (Cambridge: University Press, 1992).

<sup>5</sup> *Brandenburg v. Ohio*, 395 U.S. 82 (1969).

speech to be suppressed if it merely had the "tendency" to cause future illegal conduct, and on this ground the state severely suppressed the expression of all kinds of antiwar sentiments.<sup>47</sup> From the perspective of the United States, therefore, the question is whether the counterdemonstrations in your example would pass or fail the *Brandenburg* test.

Your example raises real difficulties in the theory of freedom of speech. There are many ambiguities that course through the case law. The *Brandenburg* test requires judgments that are necessarily discrete and contextual, and so subject to abuse. And while courts without a doubt read the relationship between speech and violence with an eye to how acceptable they find the speech,<sup>48</sup> this suggests that judicial judgments are made by fallible human beings. As a general matter, however, I cannot see how these difficulties are connected to the question of hate speech. I do not see why we would not apply in the context of hate speech the same rules for connecting speech to illegal conduct that we would apply in any other context.

PM: A possible reason for special rules for connecting speech to illegal conduct in the context of "hate speech" may be that such speech can create imminent danger of violence even if the speaker claims that he/she did not intend to incite those actions. If/She only wanted to express his/her opinions. How would you conceptualize the connection between speech and the imminent danger of the sort we are talking about that speech can create or directly and decisively contribute to?

RP: Analogous difficulties are created in all situations in which the *Brandenburg* test applies. It used to be said that the speech of even insignificant communists was like a spark that carried the potential of igniting the flame of revolution. I fail to see why hate speech presents a situation that is uniquely complicated.

PM: This discussion supports the view, that, as you said earlier, responses to "hate speech" should be contextual. Given that perspective, do you think it would be possible to develop international standards for the regulation of "hate speech"?

RP: I myself tend to be skeptical toward efforts to implement universal standards. Universal standards tend to be articulated at such a high level of abstraction, and to be filled with so many exceptions and qualifications, as to lose the capacity to guide and control state action. In my view, the impulse to regulate hate speech, and the degree of immunity it will claim from regulation, will depend upon such particular and historical circumstances as the need of specific countries to ensure freedom of speech to underwrite democratic legitimation. The greater the need of a nation for mechanisms of democratic legitimation, the more freedom of speech it will allow.

We should also recognize that the significance of rules of civility will vary from country to country. The fundamental diversity in the nature and meaning of civility rules has been demonstrated by my colleague Jim Whitman.<sup>49</sup> The need to allow freedom of speech will always be balanced against the need to enforce civility rules, and these balances will work themselves out differently in different countries. The balance will necessarily be path-dependent and particular.

PM: Could there be a universal definition of "hate speech"?

RP: We can always construct a definition. The question is whether the definition will do any work. In fact, we have to define the speech carefully to designate the focus of the speech that will receive distinctive legal treatment. This is no easy task. Roughly speaking, we can define hate speech in terms of the harms it will cause – physical contingent harms like violence or discrimination, or we can define hate speech in terms of its intrinsic properties – the kinds of words it uses, or we can define hate speech in terms of its connection to principles of dignity, or we can define hate speech in terms of the ideas it conveys. Each of these definitions has advantages and disadvantages. Each intersects with first amendment theory in a different way. In the end, any definition that we adopt must be justified on the ground that it will achieve the results we wish to achieve.

PM: There can be many definitions then. If so, are all of them arbitrary?

RP: Any definition of "hate speech" will be constructed to serve a particular purpose. We must evaluate the status of "hate speech" so defined in order to determine whether it achieves what we wish to accomplish and whether the harms of the definition will outweigh its advantages.

PM: Felix Mendel argues that Articles 19 and 20 of the International Covenant on Civil and Political Rights could be the basis of a consistent standard, though courts are not clearly interpreting these provisions.<sup>50</sup>

RP: I am skeptical that these Articles in fact articulate a useful standard. If we look only at Article 19, for example, what is "the freedom of expression"? Is it the right of a student to talk in class regardless of the instruction of her teacher? Is it the right of a lawyer to talk in court regardless of the instructions of a judge? Article 19 contains such general language as to be practically useless. In order to determine the actual parameters of "freedom of expression," we will have to define the values served by freedom of speech, and these values will invariably become context specific.

<sup>47</sup> See, e.g., *Dickens*, United States, 249 U.S. 20 (1919).

<sup>48</sup> Compare *NACLP v. U.S. Supreme Court*, 453 U.S. 586 (1981), with *RA v. U.S. Ct. of N. D.*, 404 U.S. 377 (1972) and *Virginia Black*, 353 U.S. 484 (1957).

<sup>49</sup> James Q. Whitman, "Enforcing Civility and Respect: Three Societies," 83 *Yale L.J.* 1291 (1973-74).

<sup>50</sup> Felix Mendel, "Does International Law Provide for Consistent Rules on 'Hate Speech'?", *Chicago* 20 (1999).

To take another example, Article 19 requires freedom of speech "regardless of frontiers."<sup>32</sup> What does that mean? If freedom of speech is as I suggest, logically and sociologically connected to democratic self-determination, how can its regulation be separated from the limits of self-determination? Almost all international statements I have seen suffer from immediate and obvious defects of this kind. They join together goods that are in tension and assume that all is well. They are very much in the abstract, but in the concrete world of law, they do not seem to me to provide much analytic clarity, precision, or guidance.

Article 20 suffers from analogous ambiguities. To know how to interpret Article 20, one would need a persuasive theory of meaning of words like "hated" and "incitement" and "hostility." As we interpret these words differently, so Article 20 will come to be more or less in tension with other principles of freedom of speech.

PM: You emphasized that education specifically should contribute to sustaining the deeper structures of democracy. What sort of educational policies would you suggest?

RP: Ann Gutmann has a good discussion of this question in her book *Democratic Education*.<sup>33</sup> Democratic education is necessary in order to sustain our commitment to and understanding of the value of democratic self-government. It is necessary in order to inculcate the practical virtues that democratic citizens must exercise if democracy is to succeed. These virtues include sustaining the balance between toleration and self-authorship; maintaining faith in the long-run dependence of state policy upon evolving public opinion despite short-run debates; balancing national imperatives against local needs and values; affirming the priority of civilian authority as against the temptations of military force; pricing peaceable transitions of power; protecting freedom of speech; and so on. There are innumerable necessary democratic virtues that we take for granted. All are premised on the belief that a stable democratic polity is of fundamental value and must be preserved. This belief doesn't come from God, from human rights instruments, from natural law, or from nature. It comes from community commitments that justified through socialization and education.

Public education in a democracy takes many forms. There is primary socialization, which occurs in the family and in elementary institutions of education. There is the continuous education of the state, which occurs through public education, public monuments, art, prizes, stamps, and street names. There is the peer-to-peer education that occurs through forms of civic engagement. And so on.

<sup>32</sup> Section 2 of Article 19 provides: "Everyone shall have the right to hold opinions; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, art. 19, 22 (December 16, 1966), 2 U.S.T. 1143.

<sup>33</sup> Ann Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1992).

PM: Would it be acceptable if the U.S. government gave awards for the best achievement in the last year in the struggle against prejudice and the promotion of diversity?

RP: Of course. Restraints on what the government chooses to praise are chiefly political. We give prizes for cultural achievement at the Kennedy Center, we give prizes for essays on a many different topics, we award research grants, we endorse lectures, and so on. Courts do not typically review such activities.<sup>34</sup>

PM: Law, too, can be educative. Some defend the prohibition of "hate speech" on the ground that it has considerable educational value, instructing the public about certain important virtues.

RP: It is entirely true that law is educational.<sup>35</sup> But law is not only educational. The law also regulates and controls behavior. Thus the criminal law not only expresses society's extreme condemnation and abhorrence of certain conduct, it also uses the state's monopoly on legitimate violence to prevent that conduct. If does this through stigmatization as well as punishment. If law were merely expressive, then it would make sense to regard hate speech regulation as a form of public education. On this view, hate speech regulation would do no more than express our society's abhorrence of intolerance and bigotry. It would teach health lessons in social respect and solidarity. Hate speech regulation would be no different than a president's exhortation to mutual respect.

But because law is much more than merely expressive and educational, because it also punishes and regulates, the view you describe does not rest on an adequate account of hate speech regulation, which also penalizes participation in public discourse by those who hold certain views condemned by the state. This not only sends a message of intolerance—that those who believe certain ideas are not welcome within processes of public opinion formation—but it also undermines democratic legitimation with respect to such persons. It stands as an open invitation to exclude from public-opinion formation those who hold views that a majority believes should be beyond the pale. These are very dangerous and costly moves in a democracy. It can breed intolerance as easily as tolerance, it can promote resentment and social instability as easily as it can promote solidarity and respect. The actual effects of hate speech regulation will be highly contextual, depending upon national traditions, histories, and so forth.

PM: One last question about education, connecting the need for education and the need for the cultural preconditions for legitimacy through public discourse. To

<sup>34</sup> Post, *Signifying*, 5; National Endowment for the Arts, *Index*, 324 (U.S. 960, 1995).

<sup>35</sup> Robert Post, "The Social Foundations of Privacy, Community, and Self in the Common Law Tradition," *Cal. L. Rev.* 957 (1996).

what extent can countries like Hungary create these preconditions by developing history books that can support a common sense of history?

RP: One cannot create collective memory merely by writing excellent history. But certainly excellent history is a helpful aid in the creation of a stable narrative of collective memory. I tend to think that stable historical narratives both depend upon a healthy respect for facts and upon a compelling and perhaps non-historical sense of the meaning of facts. If the political victors in Hungary can change the facts and the significance of those facts every few decades, the nation cannot establish a coherent narrative about its fundamental values. Respect for facts thus calms the efforts of the state monopolists to manipulate history.

PM: Since Hungary became democratic in 1989, it should be able to develop a common sense of history, including an at least largely shared interpretation and conceptualization of our history in the last century.

RP: That would be wonderful.

PM: Suppose two countries are involved, for example, consider the Israeli/Palestine conflict.

RP: Israel and Palestine have two different historical narratives. Dialogue between Israel and Palestine is complicated by the difficulty of persons talking to each other out of two entirely distinct historical frameworks that create incompatible visions of justice and of the future. There is no easy or simple solution to that problem.

PM: Slovakian and Hungarian historians and history teachers have also been working for years on common history books in which they try to harmonize their distinct national narratives.

RP: That's very hopeful.

PM: A standard argument for leaving "hate speech" unregulated is that the most effective response is more speech. But it raises the question whether the state should go further than engaging in counterspeech, should it encourage and facilitate private counterspeech? Katharine Gelber argues that the state and the political community of a country should enable members of the targeted minority – say, Roma in Hungary – to answer forcefully.<sup>35</sup> What do you think about this argument?

RP: It depends on exactly what this argument means. Should the president of Hungary speak out against anti-Roma hate speech? Of course. Should the Hungarian parliament speak out against such hate speech? Of course. Should the Hungarian prime minister? Of course. I can't think of any argument against the state participating in the formation of public opinion in this way. It is a separate question

what it might mean for the state to "facilitate" the speech of the Roma themselves. Much would depend upon the exact steps taken. So, for example, to permit Roma to use public fora but to prevent their opponents from using the same fora would be quite problematic. Yet for the state to offer rhetorical assistance to groups otherwise excluded from public discussion would present an entirely different question.

PM: What do you make of Clark Lawrence's suggestion that when racist, or homophobic, or religiously targeted speech occurs at a university, then the whole university must react? That proposition can be analogized to the idea that the whole state has to do something.

RP: There is a sense in which I regard Lawrence's observation as correct, and a sense in which I regard it as very misguided. It seems right to me that a university is a community and it must defend itself as a community. Racist attacks within a university are the concern of the entire community, and those who speak for the community have an obligation to defend it by articulating the values proper to the community. But if universities were to be held "responsible" for the speech of their members, there could be no academic freedom.<sup>36</sup> If a university were to be held accountable for the ideas, and expressions of its members, it could not cede to its faculty or students the freedom to think independently, and this independence is required by the very idea of a university. So in most cases a university should not be held accountable for the racist speech of its faculty or students as distinct from its administrators, but at the same time a university must assume the responsibility for ensuring the conditions of mutual respect and safety necessary for the functioning of a university. By analogy, no state that imagines itself as democratically responsive to public opinion can assume responsibility for what is said within public discourse. Nevertheless, any democratic state must ensure that public discourse remains sufficiently civil and as to perform its function of democratic legitimation.

PM: What about the argument that restricting alleged defamation of religious is necessary in order to protect religious sensibilities? Under your model of public discourse, how could we deal with the challenge posed by religious sensitivity?

RP: Religious sensitivity is fast becoming an increasingly salient problem in Europe. In my view, however, there should be no structural difference between our analysis of speech that is defamatory of groups (racist speech) and speech that is defamatory of religious (blasphemy). There are some very early and very poor opinions by the European Court of Human Rights<sup>37</sup> that seem to imply that speech offensive to religious sensibilities can be suppressed as blasphemous, but these opinions would seem to cede control of public opinion formation to religious groups, and in a civil society

<sup>35</sup> *For the Common Good: Principles of American Academic Freedom* (Athens, W. V.: Oxford & Robert C. Post eds., Yale University Press, 2007), 10.

<sup>36</sup> See Robert Post, "Reason and Freedom of Speech: Portents of 'Minutemen,'" 14 *Constitutionalism* 72 (2007).

<sup>37</sup> Katharine Gelber, "Reconceptualizing Counterspeech," Chapter 10 herein.

that is not defensible. It makes little practical sense, because religious sensitivities can be, and indeed frequently are, logically incompatible with each other. What offends Catholics does not offend Muslims, and vice versa. Sometimes what is offensive to one religion is affirmatively necessary to another. Oliver Cromwell famously issued a directive regarding the religious liberty of the Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience, but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted."<sup>45</sup> For these reasons, any test that would seek to determine the acceptability of public speech by reference to subjective religious sensitivities would instantly entangle itself in absurdities and self-contradictions of the worst kind. The test for the acceptability of public speech must in the end turn on a neutral secular standard.

PM: The United Nations General Assembly and Human Rights Council still approved resolutions aimed at "combating defamation of religions."<sup>46</sup>

RP: I confess I don't understand the meaning of such a resolution. If I say that Jesus Christ is the only true God, the statement could simultaneously affirm my deepest faith and define Islam. An international standard of defining religions would instantly lead to heated internal contradictions.

PM: Hopefully our global community will not restrict freedom of speech in such an absurd way.<sup>47</sup> Thank you so much for the interview.

RP: Thank you, Peter.

<sup>45</sup> McNamely, *Pat.* 435 (U.S. 605, 631 n. 2, 1998) (Circuit Court); quoting Oliver Cromwell.

<sup>46</sup> See, e.g., U.N. General Assembly, Office of Public Information, Press Release GA/5110/1996, *Third Committee Approves Resolution Aimed at Combating Defamation of Religions* (November 12, 2009), available at <http://www.un.org/News/Press/docs/2009/11/20091112.ga.1996.doc.htm>. The Resolution passed by a vote of 70 to 25, with 25 abstentions. *Id.* The United States voted against the Resolution, because it would not agree that prohibiting speech was the way to promote tolerance. *Id.* Support for this resolution has waned over the years. It was approved again in March 2010, but in the narrowed margin to 49 to 23. U.N. Human Rights Council, Res. 14/69, *Rep. of the Human Rights Council* (U.N. Doc. A/HRC/14/69, 22 Mar. 2010). The vote was 20 to 17, with 5 abstentions.

<sup>47</sup> In 2001, the Human Rights Council adopted a resolution condemning violence, discrimination, and incitement to religious hatred without reference to "defamation of religions." U.N. Human Rights Council, Res. 12/63, *Rep. of the Human Rights Council* (A/HRC/12/63, chap. I (Mar. 24, 2011)). See also Robert Post, *Is "Defaming Religions" Wrong on Defining Religion?*, *Newsweek* (Mar. 24, 2011), available at <http://www.newsweek.com/2011/03/24/defaming-religion/>.

## Is There a Case for Banning Hate Speech?

Bhikhu Parekh

During the past few decades, there has been an almost universal trend toward banning so-called hate speech directed at individuals or groups on the basis of their race, ethnicity, nationality, or religion.<sup>1</sup> The prohibited forms of expression vary from country to country, but the basic thrust is the same. Britain bans abusive, insulting, and threatening speech. The United States and Canada prohibit speech that is insulting and degrading, and India and Israel ban speech that incites racial and religious hatred or is likely to stir up hostility between groups. In the Netherlands, it is a criminal offense to express publicly views insulting to groups of persons. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups, and some of its states have laws banning racial vilifications. Germany goes further, banning speech that violates the dignity of an individual, implies that he or she is an inferior being, or maliciously degrades or defames a group.

Many of these countries claim to be guided by or find support in the International Covenant on Civil and Political Rights, particularly Article 20, which requires a ban on "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination."<sup>2</sup> Some of them are also signatories to the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4 of which requires parties to "condemn all propaganda and organizations based on theories of racial superiority and incitement to racial discrimination and acts of violence" and to eradicate "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing

<sup>1</sup> International Covenant on Civil and Political Rights, art. 20 (U.N. Doc. 2201 (XXI) U.N. GAOR 25th Sess., Supp. No. 16, U.N. Doc. A/50/16, 16, 1976).

<sup>2</sup> See earlier version of this chapter (now published under the title "Hate Speech") in *Public Policy Review* 20, 10 (2006).

laws will not examine it too closely. However, when the position is scrutinized, there is a precipitate retreat by its main proponent to a much more moderate claim – hate speech laws may diminish the legitimacy of downstream laws (or they *may* lead to something of a “deficit” in legitimacy) even though they do not “spoil” the legitimacy of these laws altogether. Indeed, under pressure, the retreat is to a claim that may be of vanishing significance in relation to laws of the kind that we are realistically considering and actual public debates of the sort in which such laws typically intervene. I think of this chapter, then, as an exercise in resistance to browbeating. There may be a case to be made against hate speech laws, but it needs to be made with greater care than this.

## Reply to Jeremy Waldron

Ronald Dworkin

Professor Waldron believes that I treat a “precipitate retreat” from an earlier position in an email to him commenting on an argument he made.<sup>1</sup> He has called my “bluff” and resisted my “browbeating.” I did not intend the email for publication, but I cannot find any retreat there. I had said, in the “Foreword” Waldron cites, that a law criminalizing “hate” speech “spoils the democratic justification we have for insisting that everyone obey.”<sup>2</sup> I said, in the email Waldron decided to quote, that such laws leave us with “something worthful to regret” and with “a deficit in legitimacy.” In an earlier book Waldron cites, I said that legitimacy is a matter of degree, and that not every law that is “spoiled” by a defective democratic pedigree justifies citizen rebellion.<sup>3</sup> Claiming that an opponent has retreated is often a useful rhetorical device, but it seems unproductive in this case. We can hardly justify a deficit in political legitimacy by arguing that it might have been worse.

Waldron appears to accept, at least in this essay, that it is indeed a defect in legitimacy to enforce legislation against those who were not permitted to speak in opposition during the political process that produced that legislation; that this does “spoil” the democratic pedigree of the legislation to some degree. If the legislation in question required everyone to carry health insurance, for example, then suppression of even “unproductive” dissent would put the legitimacy of that law “in question.” He thinks hate speech is different, apparently, for two reasons. One of these – that issues of racial dignity have been settled in mature democracies – is doubtful, and Waldron offers it with what seems great hesitation. Well he might. These issues seem much less settled now – in Germany and the Netherlands, for example, as well as in Britain and the United States – than they seemed decades earlier. The other reason Waldron

<sup>1</sup> See Jeremy Waldron, “Hate Speech and Political Legitimacy,” Chapter 16 in *idem*, All rights reserved: Waldron on law, liberty and politics.

<sup>2</sup> Ronald Dworkin, “Foreword,” in *Justice Speech and Democracy*, Joan Hus & James Weinstein eds., Oxford University Press 1999.

<sup>3</sup> Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985).



offers is interesting, however, it touches a very deep issue in political philosophy. What is the basis of the "equal concern and respect" that coercive government owes those who fall under its dominion?

Waldron seems to assume that government owes equal concern and respect to all members of the political community because every member of the community does, even as a private individual. He suggests that racists dissent "from the broad abstract principle that individuals must show equal concern and respect to all members of the community."<sup>4</sup> Given that we ourselves accept that principle, Waldron argues, the phenomenon of hate speech requires balancing. On the one hand, government does compromise legitimacy – it fails to treat racists with the kind of respect any justification of democracy assumes – when it obstructs their participation, on their own terms, in the democratic process. In that sense, hate speech is like vituperative opposition to health care legislation. In both cases, censorship would compromise legitimacy, but hate speech is different because vituperative hate speech also denies some citizens – its targets – the equal concern and respect they are entitled to have from other citizens. So balancing is necessary. Censorship of the worst forms of hate speech, at least, is justified on balance because the damage such speech does to the respect owed its targets outweighs the damage done to racists by compromising their democratic rights.

But the "abstract principle" that supposedly grounds this argument is mistaken. It fails to notice the crucial difference between the rights and responsibilities of government – our responsibilities when acting collectively and coercively in politics – and our responsibilities as individuals operating within the structure of coercive law. Government must treat the fate of each citizen as of equal importance. But I need not. I do not owe you or your children the census, when I act as an individual depleting my own resources, that I show to my own children or to myself. Government may not adopt any ethical convictions – an opinion about the true basis of human dignity – and enforce that view against dissenting citizens. It must recognize a right of ethical independence. But recognizing that right means that no individual citizen may be forced to accept any official ethical conviction or be prevented from expressing one's own dissenting convictions. It is a popular view, for instance, that athletes cannot be trusted because they have no beliefs that can ground a moral commitment. I find that opinion deeply offensive because it denies me status as a moral agent, and moral agency is a matter that, as Waldron puts it, "penetrates so comprehensively and diffusely in almost every aspect of their dealings with others." No law would be acceptable, no matter how popular, that rested on that ethical opinion. But I have no right that others, who do believe I lack that basic dignity, not hold or express that conviction as individuals. Living in a just society – a society whose government respects human dignity – means that I must accept the right of others to hold me in contempt.

So regulating hate speech is not, after all, a matter of balancing. Government may not violate the rights of any citizen to the ethical independence from government

that dignity requires. It is an excuse that it does so to enforce a particular collective opinion about what forms of respect individual human beings owe one another just as human beings, that "excuse" only confirms the mistake. I myself believe that one opinion about that latter issue is correct and others mistaken. But it does not lie within the powers of just government to try to identify and impose that truth.<sup>5</sup> To be sure, life would be more pleasant for some members of the community – and less pleasant for others – if government had that power. But a government is not fully legitimate that claims it.

I have some other, less central, comments about Waldron's essay. I agree with him, first, that my argument does not suppose that "laws against racial violence or criminal damage" are in any way compromised when expressions of racial hatred are banned. I do not, however, understand why he thinks they might be. He suggests, second, that censorship of "hate" speech is comparable to "time, place, and manner" restrictions on political demonstrations, but that the latter are permissible such when they are, as constitutional lawyers put it, "content-neutral." Justifications for time, place, and manner restrictions are not based on any judgment, as censorship of race speech must be, that the speech restricted is false or offensive.

I am surprised, third, that he seems to argue such for banning the crudest forms of hate speech: speech that declares that some people are no better than the animals "we would normally seek to exterminate, like rats or cockroaches." That is not the danger, no person or political party that hoped to attract support or attention would speak in that way. If Waldron's case for censorship of hate speech is to commit an actual politics, it must reach what is actually said and feared. "The holocaust was, invented by Jews for their own advantage." "Moderns are all terrorists who should be slain." "Islam has contributed nothing of value to the world's culture." "The immigration of alien races will destroy the indigenous culture that we, who have developed and embraced that culture, have a right to protect." "They should all be sent back where they came from." None of these unbigotten declarations implies that any human being is no better than an animal or should be exterminated like a cockroach. None implies that anyone inherently lacks the status or dignity of a human being. Any argument that hopes to defend the hate speech laws actually in force in European countries must defend censorship of the kind of speech that is actually used to inspire hatred.

Europeans have said to me, on many occasions, that their history is different from and darker than that of the United States, and that if I had been born in Europe, I would share their opinion rather than the reflex First Amendment to they think an

<sup>4</sup> In *Justice for Hedgehogs* (Harvard University Press 2011) I argue for what I take to be the correct account of what kind of respect people owe each other as individuals, and I describe what I believe to be the best ethical, moral, and political consequences of that view. But I also argue there is some leeway for a right of personal independence from coercive government in the ethical as distinct from the moral sphere.

<sup>5</sup> E.g., *Ward v. Black Against Racism*, 40 U.S. 560, 562–4 (1999).

American disease.<sup>16</sup> They may be right about the impact of history on construction. A great many distinguished and otherwise liberal European political philosophers do support censorship in this area, although of course others do not. In any case, however, explanation of a constitution's genesis is not an argument for its truth.

<sup>16</sup> Stephen Holmes's comments in this volume take something of the same view. See Stephen Holmes, "Waldron, Machiavelli, and Hate Speech," Chapter 18 below.

## Waldron, Machiavelli, and Hate Speech

Stephen Holmes

### I

I am not particularly knowledgeable about the subject of hate speech. I am not a philosopher at all. Yet Peter Mohr has pursued me persistently to contribute to this project. I could not understand why he kept calling me up and sending me email, telling me I should speak on a subject I know nothing about. I finally realized that the answer had to be that I once bumped into him at Washington Square Park and we had a conversation about hate speech.

That conversation took us back to the mid-1990s, when I heard Ronald Dworkin lecture in Budapest. Dworkin was speaking, of course, a few hundred miles away from the Balkan tragedy, where hundreds of thousands of people were killed on the basis of violent hate ideologies, and on a continent in which a hundred million people were killed in that century on the basis of violent hate ideologies. My recollection is that he argued for total freedom to express hatred of other people, without considering this context.

It does not take Sigmund Freud to understand that, if you have two continents, one of which one hundred million people were killed on the basis of highly violent hate ideologies, accompanied and propelled by extreme hate speech, and in the other of which, at least by comparison, basically nothing happened, you will get different judicial traditions. This is not a legal point, it simply reflects the fact that what drives people most in their judgments is their own experience – or, to be precise, their remembered experience. When you forget about the Great Depression, then you say, "Well, government doesn't need to regulate the banks anymore." When you forget about the Vietnam War, you can say, "We should go over to Iraq." So, what you remember – your experience – is far more consequential than norms of philosophy.

This is a revised transcription of remarks delivered on March 25, 2009, at the Cardozo School of Law, largely in response to a question by Jeremy Waldron based on the chapter in the current volume.